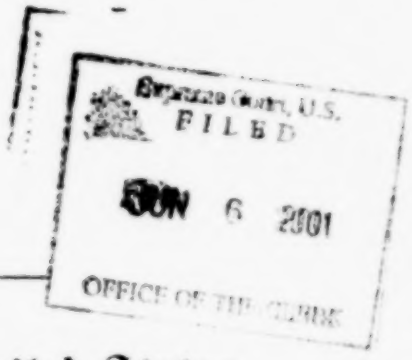


No. 00-1711

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

Susan Stevens Miller
General Counsel
Maryland Public Service Commission
6 Saint Paul Street
Baltimore, Maryland 21202
(410) 767-8039

QUESTIONS PRESENTED

1. Whether 47 U.S.C. §252(e)(6) grants a federal district court jurisdiction to review decisions of a state commission enforcing or interpreting previously approved interconnection agreements.

2. Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review state commission orders rendered pursuant to the Telecommunications Act of 1996 where suit under 47 U.S.C. §22(e)(6) is barred pursuant to the Eleventh Amendment to the United States Constitution.

3. Whether a state commission waives its sovereign immunity by participating in the administration of the Telecommunications Act of 1996.

4. Whether the *Ex parte Young* doctrine authorizes suit against the individual state commissioners for actions taken pursuant to the Telecommunications Act of 1996.

TABLE OF CONTENTS

Pages

I. STATEMENT OF THE CASE 2

A. The Telecommunications Act of 1996 3
B. Proceedings before the Maryland Commission 4
C. District Court Decision 6
D. The Fourth Circuit Decision 7

II. DISCUSSION 8

III. CONCLUSION 12

TABLE OF AUTHORITIES

Pages

Cases

Bell Atlantic-Maryland, Inc. v. Maryland Public Service Commission, Civil Action No. 178260, Docket Entry #26 (March 26, 1998) 5

Ex parte Young 209 U.S. 123 (1908) 8

Mathias v. Worldcom Tech., Inc. No. 00-878 (March 5, 2001) 11

Annotated Code of Maryland

Public Utility Companies Article §3-204 2

§3-209 2

Administrative Decisions

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Declaratory Ruling, CC Docket 96-96 14 F.C.C.R. 3698 (February 26, 1999) 5

Pages

Other Materials

Telecommunications Act of 1996, Pub. L. No. 104-104
Purpose statement, 110 Sta. 56 (1996) 2,3

United States Code

28 U.S.C. §1331 2,8,9

47 U.S.C. §251 3

47 U.S.C. §251(a) 3

47 U.S.C. §251(b)(5) 3

47 U.S.C. §252 3,4

47 U.S.C. §252(e)(6) 8

47 U.S.C. §252(d)(2)(A) 3

47 U.S.C. §252(e)(1) 4

Pages

47 U.S.C. §252(e)(2)(A) 4

47 U.S.C. §252(e)(6) 8

No. 00-1711

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION

The Maryland Public Service Commission and the individual Commissioners acting in their official capacity (collectively "the Maryland Commission") respectfully respond to the petition for writ of certiorari filed by the United States of America ("United States") seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Maryland Commission. The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *Public Utility Companies Article* §3-204 of the Annotated Code of Maryland. Parties are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the Telecommunications Act of 1996 ("1996 Act") to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act and 28 U.S.C. §1331.

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.) to open the local telecommunications markets to competition.[1] The 1996 Act[2] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in

---

[1] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

[2] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between CLECs and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's

decision was upheld by the Circuit Court for Montgomery County, Maryland.[3]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the jurisdictional status of calls to ISPs.[4] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State commissions."[5] In response to the FCC Order, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission, resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the MFS Agreement, the Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the MFS Agreement are entitled to reciprocal compensation for ISP-

---

[3] Civil Action No. 178260, Docket Entry #26, March 26, 1998.

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

[5] *Id.*, at para. 1. See, also, para. 22.

bound calls until July 1, 1999. (Pet. App. 103a-104a) Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of previously approved interconnection agreements. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Commission and the individual commissioners were immune from suit under the Eleventh Amendment;[6] (Pet. App. 77a-84a) (2) the Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission; (Pet. App. 84a- 86a) (3) alternatively, Verizon's challenge to that portion of the

[6] Based on this holding, the District Court declined to address the Commission's argument that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

Commission's Order relating to the SGAT was not ripe for review. (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that a federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a state commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a)

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a)

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement determinations. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, determinations by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a) The Court of Appeals then

held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a) Thus, according to the Court, these orders are reviewable only by State courts. (*Id.)*

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted)

DISCUSSION

The petition for certiorari seeks review of the Fourth Circuit's decision holding that the Maryland Commission did not waive it's Eleventh Amendment immunity to federal district court review when it implemented the 1996 Act. The United States also seeks review of the Fourth Circuit's holding that the *Ex parte Young*[7] doctrine does not permit an action against the individual commissioners in their official capacity. Further, the United States seeks review of the Court of Appeals' finding that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C.

[7] *Ex parte Young*, 204 U.S. 123 (1908).

§252 (e)(6). Finally, the United States seeks review of the Fourth Circuit's holding that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review determination rendered by a State commission pursuant to the 1996 Act.

The United States notes that this Court granted the petition for certiorari in *Mathias v. Worldcom Technologies, Inc.* (No. 00-878). *See*, 121 SCF 1224. The United States contends that the questions presented in *Mathias* are essentially identical to the questions presented in this case. However the United States fails to alert the Court that the Fourth Circuit decision at issue is actually much broader than the Seventh Circuit decision appealed in *Mathias*. The Illinois Commerce Commission order at issue in *Mathias* was solely an enforcement decision, i.e., the Order interpreted and enforced a previously approved interconnection agreement. In contrast, the Maryland Commission Order which was the subject of Verizon's original complaint is an enforcement order **and** an arbitration order. The Maryland Commission interpreted previously approved interconnection agreements and provided for reciprocal compensation for those competitive carriers still in the arbitration process. Thus, the Fourth Circuit determined that the Maryland Commission has Eleventh Amendment immunity for **any** suit brought pursuant to 47 U.S.C. §252 (e)(6), not just suits objecting to the Maryland Commission's interpretation and enforcement of approved interconnection agreements.

The Fourth Circuit itself recognized that its holdings with regard to the constructive waiver of Eleventh Amendment immunity, the application of the *Ex parte Young* doctrine and the scope of §252 (e)(6) of the 1996 Act

conflict with decisions in other jurisdictions.[8] (Verizon App 20a, 30a and 44a-45a) As the Maryland Commission stated in its opposition to the Verizon petition, the Maryland Commission does not oppose certiorari on these questions. However, the Maryland Commission's decision not to oppose certiorari should not be viewed as signaling agreement with the substantial issues raised by the United States before the Fourth Circuit. On the merits, the Maryland Commission disagrees with the Untied States' presumed position and believes, as summarized in the Maryland Commission's Brief in Opposition to Verizon's petition,[9] that the Fourth Circuit's decision on these issues is correct.

The United States raises a fourth question which is not an issue in *Mathias*. The United States suggests that the Court should determine whether jurisdiction exists under 28 U.S.C.§1331, either in the context of the *Mathias* appeal or by granting the writ of certiorari requested in this appeal. However, the United States provides no legitimate justification for its argument that the Court should consider this issue. The United States claims no conflict with any other Circuit Court nor of any decisions of this Court. The United States' sole justification for advocating granting the Petition on this issue is that there is "a need for prompt and definitive resolution of the question" regarding a federal court's jurisdiction to review state commission actions taken pursuant to the 1996 Act. United States' Petition at page 13-14. Of course, every litigant would like this Court to resolve

---

[8] The Court of Appeals decision is reproduced in the Appendix to Verizon Maryland's Petition for a Writ of Certiorari in No. 00-1531 [hereafter Verizon App].

[9] Public Service Commission of Maryland Brief in Opposition to Verizon Maryland's Petition for a Writ of Certiorari (No. 00-1531) at page 17-27.

all of the issues impacting a claim.[10] The Court should find that this desire, in and of itself is not enough to justify granting a petition for writ of certiorari. Moreover, as discussed in the Maryland Commission's Opposition to Verizon's Petition for a Writ of Certiorari, the Court of Appeals was correct in holding that the federal district courts do not have independent subject matter jurisdiction under §1331 to review State commission decisions rendered pursuant to the 1996 Act.

The United States also raises the contention that the Illinois Commerce Commission ("ICC") and its Commissioners, who are the appellants in *Mathias*, may no longer have standing to seek review. Of course, the ICC is not a party to this proceeding and therefore cannot defend itself from this allegation. While the Maryland Commission was not a participant in any of the proceedings leading up to the *Mathias* appeal, the Maryland Commission notes that the Untied States' contention ignores the unusual procedural posture of that case. The District Court in Illinois took the unusual step of ruling on the merits of the complaint **first**. Judge Coar ruled on the merits on July 21, 1998. This judgment was entered on August 4, 1998. The District Court did not deny the ICC's motion to dismiss until August 25, 1998.[11] Thus, the ICC appealed the District Court's resolution of the Eleventh Amendment immunity issue as

---

[10] If the United States and Verizon truly wanted to resolve **all** of the uncertainties surrounding federal court jurisdiction, they would have requested that the Court also resolve the issue of whether a State commission is an indispensable party such that suits cannot proceed in the absence of the State commission. Judge Smalkin of the Maryland District Court found that the Maryland Commission was an indispensable party. Verizon App. 84a-86a. The Fourth Circuit did not rule on this issue.

[11] See Joint Appendix, *Mathias, et. al. v. WorldCom Technologies*, et al., No. 00-878 at pages 3a-4a, 181a.

soon as possible. It would be manifestly unjust to deny the ICC the right to appeal this ruling.

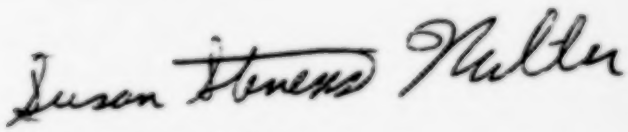
Finally, the Maryland Commission is forced to take issue with some "factual" statements made by the United States. The United States avers that the Maryland Commission "has voluntarily exercised regulatory authority under the 1996 Act". United States Petition at 6. Of course, whether any State commission acted "voluntarily" in implementing the 1996 Act goes to the heart of the question regarding whether the State has constructively waived its Eleventh Amendment immunity. The District Court of Maryland specifically found that the Maryland Commission did not constructively waive its Eleventh Amendment immunity by implementing the 1996 Act. Verizon App 77d-79a. The Fourth Circuit affirmed this holding. Verizon App 18a-21a. For the United States to imply that as a factual matter the Maryland Commission "voluntarily" implemented the 1996 Act is disingenuous at best.

CONCLUSION

The Maryland Commission does not oppose certiorari insofar as the United States seeks review of the Fourth Circuit's holdings concerning constructive waiver, the application of the *Ex parte Young* doctrine and the

extension of §252 (e)(6) jurisdiction to enforcement decisions of state commissions. In all other respects, the petition for certiorari should be denied.

Respectfully submitted,



Susan Stevens Miller
General Counsel
Maryland Public Service
Commission
6 Saint Paul Street
Baltimore, Maryland 21202